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**Issue Date: 24 February 2006**

*In the Matter of*

**PATRICK KINSER**,
Claimant

v.

**ELKAY MINING COMPANY**,
c/o Accordia Employers Service
Employer

and

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS**,
Party-In-Interest

**Case No. 2004-BLA-05379**

Appearances: Jennifer M. McGinley, Esq.
Ballard McGinley, PLLC
For the Claimant

Mary Rich Maloy, Esq.
Jackson, Kelly, PLLC
For the Employer

Before: William S. Colwell
Administrative Law Judge

## DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. The Act and applicable implementing regulations, 20 CFR Parts 718 and 725, provide compensation and other benefits to living coal miners who are totally disabled due to pneumoconiosis and their dependents, and surviving dependents of coal miners whose death was due to pneumoconiosis. The Act and regulations define pneumoconiosis, commonly known as black lung disease, as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. § 902(b); 20 CFR § 718.201 (2004). In this case, the Claimant, Patrick Kinser, alleges that he is totally disabled by pneumoconiosis.

I conducted a hearing on this claim on January 20, 2005 in Beckley, West Virginia. All parties were afforded a full opportunity to present evidence and argument,

as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18 (2004). At the hearing, Administrative Law Judge's Exhibit ("ALJX") 1, Director's Exhibits ("DX") 1-47, and Employer's Exhibits ("EX") 1, 2, 4, and 8 were admitted into evidence without objection. Transcript ("Tr.") at 7-10. Employer's Exhibits 3, 5, 6, and 7 exceeded the evidence limitations set at 20 C.F.R. § 725.414, but the Employer contended that good cause existed to admit these exhibits. However, I did not find that good caused existed to exceed the evidence limitations and did not admit them into evidence. They shall be attached to the record for appellate purposes. The record was held open after the hearing to allow Employer to submit the deposition transcript of Dr. Crisalli, which was taken on February 28, 2005 and has been submitted. It is hereby admitted as Employer's exhibit 9. The Claimant and Employer submitted closing arguments, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits admitted into evidence, the testimony at hearing, and the arguments of the parties.

## PROCEDURAL HISTORY

The Claimant filed his first application for benefits on June 5, 1973. DX 1. It was denied on February 19, 1981, the Claims Examiner having determined that the Claimant had failed to establish the existence of coal workers' pneumoconiosis or total disability due thereto. The Claimant did not appeal that denial; however, he filed a second application for benefits on February 5, 1993. DX 2. It was denied on July 28, 1993, a Claims Examiner having determined that the Claimant had failed to establish total disability due to pneumoconiosis. DX 2. The Claimant did not appeal that denial, and on June 3, 2002, he filed the instant application for benefits. DX 4. The claim was denied by the District Director of the Office of Workers' Compensation Programs ("OWCP") on September 25, 2003, on the grounds that the evidence did not show that the Claimant had pneumoconiosis arising out of coal mine work or total disability due thereto. DX 37. The Claimant timely appealed that determination. DX 39.

## APPLICABLE STANDARDS

Since this claim was filed after January 19, 2001, the current regulations at 20 CFR Parts 718 and 725 apply. 20 CFR §§ 718.2 and 725.2 (2004). In order to establish entitlement to benefits under Part 718, the Claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose at least in part out of his coal mine employment, that he is totally disabled, and that the pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 CFR §§ 718.1, 718.202, 718.203 and 718.204 (2004).

## ISSUES

After the hearing, the following are the remaining contested issues:

1. Whether the claim was timely filed.

2. How long Claimant worked as a miner. (At the hearing, the Employer agreed to 16 years of coal mine employment.)

3. Whether he has pneumoconiosis as defined by the Act and the regulations.

4. Whether his pneumoconiosis arose out of coal mine employment.

5. Whether he is totally disabled.

6. Whether his disability is due to pneumoconiosis.

7. Whether he has one dependent for purposes of augmentation.

8. Whether the named employer is the Responsible Operator.

9. Whether the evidence establishes a material change in condition pursuant to 20 C.F.R. § 725.309.

DX 44; Tr. 5-6.

The Employer also reserved its right to challenge the statute and regulations. These issues are beyond the authority of the administrative law judge and are preserved for appeal purposes only. Tr. 6.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Factual Background and the Claimant's Testimony

At the date of the hearing, the record shows that the Claimant was married to Rebecca Ann. DX 14. The record also shows that the Claimant retired from coal mining in 1992, due to three herniated disks. His last employment was with Elkay Mining Company as a roof bolter and operator. In this job, he carried 50 pound boxes of resin about 15 times per day for a distance of approximately 200 feet. TR 14-16.

The Claimant testified at the hearing. TR 13-24. The Claimant stated that he received a state workers' compensation award for a lung related disease. Tr. 16. He stated that two doctors have told him he has black lung, one as early as 1987. Tr. 16-17. No physician told him he was disabled because of black lung. Tr. 21. According to the Claimant, he gets out of breath very easily. He uses an inhaler and a nebulizer. He

smoked cigarettes while he was in the military, and might possibly have smoked for fifteen years "off and on." He consumed from half a pack to one pack of cigarettes per day. He does not smoke currently, having quit smoking seven to nine years ago.

## Timeliness

Under 20 CFR § 725.308(a), a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. 20 CFR § 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. This statute of limitations does not begin to run until a miner is actually diagnosed by a doctor, regardless of whether the miner believes he has the disease earlier. *Tennessee Consolidated Coal Company v. Kirk*, 264 F.3d 602 (6th Cir. 2001).

For this case, the Employer contended that the claim was not timely, because the Claimant did not file a claim within three years of medical determination of total disability due to pneumoconiosis. The Employer has not presented any evidence that there was a medical finding of total disability due to pneumoconiosis more than three years before the Claimant filed this claim, and it was Claimant's testimony that he was not told by any physician that he was totally disabled due to coal workers' pneumoconiosis. Therefore, I find this claim is timely.

## Length of Employment

Claimant testified that he began his coal mine employment in 1967 for Island Creek Coal Company. Tr. 14. He then worked for Amherst Coal Company from 1972 to 1974 and for Elkay Mining Company from 1974 until 1992. Tr. 14. The Director determined that the Claimant had 23.82 years of coal mine employment. DX 37. At the hearing for this case, the Employer agreed to 16 years of coal mine employment. Tr. 5.

The record contains employment verification, establishing coal mine employment from 1967 to 1992, as well as Social Security Administration records which also verify earnings from coal mine employers from 1967 to 1993. DX 8-12. Based on the evidence of record, I find that the Claimant has established twenty-five years of coal mine employment.

## Responsible Operator

The records clearly establish that Elkay Mining Company was the coal mine employer for whom the Claimant last worked as a coal miner for a period of at least one year. DX 12. Accordingly, I find that it was properly designated the responsible operator herein.

## Subsequent Claim

In a subsequent claim, the threshold issue is whether one of the applicable conditions of entitlement has changed since the previous claim was denied. Claimant's first claim was denied in 1981 and his second claim was denied in 1993. The instant claim was filed in 2002, not within one year of the prior denial. Therefore, I must consider the new evidence and determine whether the Claimant has proven at least one of the elements of entitlement previously decided against him. If so, then I must consider whether all of the evidence establishes that he is entitled to benefits.

The United States Court of Appeals for the Fourth Circuit, under whose jurisdiction this claim arises[1], has articulated the standard to be followed in determining whether the requirements of Section 725.309 have been met. The Fourth Circuit has held that a material change in conditions is established if the weight of the newly submitted evidence demonstrates that the claimant is now entitled to benefits and that his condition has "substantially worsened" since the prior denial. It is not enough to establish that the prior decision was wrong. *Lisa Lee Mines v. Director*, OWCP, 57 F.3d 402 (4th Cir. 1995.) The Fourth Circuit aligned itself with the standard enunciated by the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir, 1994). The Fourth Circuit held that the Administrative Law Judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him.

This standard rejects the introduction of evidence which was available at the time of the initial decision which tends to show that the initial decision was in error. As was noted by the Fourth Circuit in Lisa Lee Mines, the purpose of § 725.309(d) is not to allow a claimant to revisit an earlier denial of benefits, but rather to show that his condition has materially changed since the earlier denial.

In applying the provision of § 725.309(d) and in attempting to determine whether a material change in condition has occurred, only evidence relevant to the issues capable of change are relevant. It is necessary to evaluate only the new evidence offered to determine if the Claimant has satisfied at least one element previously adjudicated against him required in establishing entitlement.

Since the present claim was denied last in 1993 on the basis that the Claimant failed to establish the existence of total disability due to pneumoconiosis, I will initially determine whether the evidence submitted since 1993 now establishes this element of entitlement. If it is established, then all record evidence must be weighed to determine if the Claimant has established all elements on the merits. Otherwise, the instant claim must be denied.

[1] The Benefits Review board has held that the law of the circuit in which the Claimant's last coal mine employment occurred is controlling. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989). The Claimant's last coal mine employment took place in West Virginia, which falls under the Fourth Circuit's jurisdiction.

## Medical Evidence

Included in the record is the State Workers' Compensation Information and Documentation. DX 13. That evidence predates the prior denial, however, and therefore, as it cannot establish a change in conditions since the prior denial, it will not be considered at this juncture.

### Chest X-rays

Chest x-rays may reveal opacities in the lungs caused by pneumoconiosis and other diseases. Larger and more numerous opacities result in greater lung impairment. The quality standards for chest x-rays and their interpretations are found at 20 CFR § 718.102 (2004) and Appendix A of Part 718. The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. Small opacities (1, 2, or 3) (in ascending order of profusion) may be classified as round (p, q, r) or irregular (s, t, u), and may be evidence of "simple pneumoconiosis." Large opacities (greater than 1 cm) may be classified as A, B or C, in ascending order of size, and may be evidence of "complicated pneumoconiosis." A chest x-ray classified as category "0," including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 CFR § 718.102(b) (2004).

The following table summarizes the x-ray findings available in this case. Physicians' qualifications appear after their names. Qualifications have been obtained where shown in the record by curriculum vitae or other representations, or if not in the record, by judicial notice of the lists of readers issued by the National Institute of Occupational Safety and Health[2] (NIOSH). If no qualifications are noted for any of the following physicians, it means that I have been unable to ascertain them either from the record or the NIOSH list. Qualifications of physicians are abbreviated as follows: A denotes a NIOSH certified A reader, B denotes a NIOSH certified B reader, and BCR denotes a board-certification in radiology. Readers who are board-certified radiologists and/or B readers are classified as the most qualified. *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B readers need not be radiologists.

[2] NIOSH is the federal government agency that certifies physicians for their knowledge of diagnosing pneumoconiosis by means of chest x-rays. Physicians are designated as "A" readers after completing a course in the interpretation of x-rays for pneumoconiosis. Physicians are designated as "B" readers after they have demonstrated expertise in interpreting x-rays for the existence of pneumoconiosis by passing an examination. Historical information about physician qualifications appears on the U.S. Department of Health and Human Services, List of NIOSH Approved B Readers with Inclusive Dates of Approval [as of ] June 7, 2004, found at http://www.oalj.dol.gov/public/blalung/refrnc/bread3_07_04.htm. Current information about physician qualifications appears on the CDC/NIOSH, NIOSH Certified B Readers List found at http://www2a.cdc.gov/drds/breaders/breaders_results.asp.

| Date of X-ray | Readers' Qualifications (all are doctors) | Reading and Film Quality | Result Concerning Presence of Pneumoconiosis |
|---|---|---|---|
| DX 17 7/11/02 | Patel, B BCR | ILO Classification (1/0)/ Quality 2 | Positive |
| DX 17 7/11/02 | Binns, B BCR | Quality 1 | Used by District Director for quality reading only |
| DX 36 7/11/102 | Wiot, B BCR | Negative/ Quality 2 | Negative |
| EX 1 9/3/03 | Zaldivar B | Negative/Quality 1 | Negative |
| EX 4 2/2/04 | Willis BCR | s/t 0/1/Quality 1 | Negative |

Pulmonary Function Test

Pulmonary function tests (PFT) are performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. The greater the resistance to the flow of air, the more severe the lung impairment. The studies range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV1) and maximum voluntary ventilation (MVV). The quality standards for PFTs are found at 20 CFR § 718.103 (2004) and Appendix B. In a "qualifying" pulmonary test, the FEV1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV1/FVC ratio must be 55% or less. 20 CFR § 718.204(b)(2)(i) (2004).

The following chart summarizes the results of the PFTs available in this case. "Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered.

| Ex. No. Test Date Physician | Age Height | FEV1 Pre-/ Post | FVC Pre-/ Post | FEV1/ FVC Pre-/ Post | MVV Pre-/ Post | Physician Impression |
|---|---|---|---|---|---|---|
| DX 17 7/11/02 Porterfield | 58 71 | 1.91 2.09 | 3.57 4.02 | 53% 52% | | Patient was unable to complete MVV procedure. Good patient effort |
| EX 1 9/3/03 Dr. Zaldivar | 59 71 | 2.26 2.45 | 3.86 4.23 | 59% 58% | | |

| Ex. No.<br>Test Date<br>Physician | Age<br>Height | FEV1<br>Pre-/<br>Post | FVC<br>Pre-/<br>Post | FEV1/<br>FVC<br>Pre-/<br>Post | MVV<br>Pre-/<br>Post | Physician<br>Impression |
|---|---|---|---|---|---|---|
| EX 4<br>2/2/04<br>Dr. Crisalli | 60<br>71 | 2.14<br>2.48 | 3.83<br>4.13 | 56%<br>60% | 81 | Effort and cooperation good |

Dr. John Michos found the study conducted on July 11, 2002 to be valid. DX 17. Dr. Michos is board-certified in internal medicine and pulmonary disease. Dr. Renn, who also reviewed that study, found that the FVC maneuvers and the numerical derivations therefrom were valid for accurate interpretation and for the derivation of significant data with which to assess the Claimant's true ventilatory function. EX 2. In his opinion, the ventilatory function was a moderately severe obstruction. Dr. Renn is board-certified in internal medicine and pulmonary disease.

Arterial Blood Gas Studies

Arterial blood gas (ABG) studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen (PO2) and the percentage of carbon dioxide (PCO2) in the blood. A lower level of oxygen (O2) compared to carbon dioxide (CO2) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled. The quality standards for arterial blood gas studies are found at 20 CFR § 718.105 (2004). A "qualifying" arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Exercise studies are not required if medically not advisable. 20 CFR § 718.105(b) (2004). The following chart summarizes the arterial blood gas studies available in this case.

| Exhibit Number | Date | Physician | PCO2 at rest/ exercise | PO2 at rest/ exercise |
|---|---|---|---|---|
| DX 17 | 7/11/02 | Porterfield | 37.3 | 65.8 |
| EX 1 | 9/3/03 | Zaldivar | 43 | 74 |
| EX 4 | 2/2/04 | Crisalli | 43 | 68 |

Medical Opinions

Medical opinions are relevant to the issues of whether the miner has pneumoconiosis, whether the miner is totally disabled, and whether pneumoconiosis is a substantially contributing cause of the miner's disability. A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from

pneumoconiosis as defined in 20 CFR § 718.201. *See* 20 CFR § 718.202(a)(4) (2004). Thus, even if the x-ray evidence is negative, medical opinions may establish the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1986). The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 CFR § 718.202(a)(4) (2004).

Where total disability can not be established by pulmonary function tests, arterial blood gas studies, or cor pulmonale with right-sided heart failure, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. 20 CFR § 718.204(b)(2)(iv) (2004). With certain specified exceptions not applicable here, the cause or causes of total disability must be established by means of a physician's documented and reasoned report. 20 CFR § 718.204(c)(2) (2004). Quality standards for reports of physical examinations are found at 20 CFR § 718.104 (2004). The record contains the following medical opinions relating to this case.

*Dr. Charles Porterfield (Examination on behalf of OWCP)*

On July 11, 2002, Dr. Charles Porterfield examined the Claimant on behalf of the Department of Labor. DX 17. Dr. Porterfield is board certified in internal medicine and medical diseases of the chest. He took occupational, social, family and medical histories, and conducted a physical examination, chest x-ray, blood gas studies and pulmonary function testing. Dr. Porterfield recorded a smoking history commencing in May of 1994 and ending in August of 1994, the Claimant having consumed a quarter of a pack of cigarettes per day. He found that the Claimant had coal workers' pneumoconiosis based on the chest x-ray, which condition he found to be due to coal mine dust exposure. In his opinion, the Claimant had a 55% impairment, and he was disabled from his previous job. Dr. Porterfield concluded that the Claimant's disability was due to his coal workers' pneumoconiosis.

*Dr. George Zaldivar (Examination of behalf of Employer)*

On September 3, 2003, Dr. Zaldivar examined the Claimant. EX 1. Dr. Zaldivar conducted an examination as well as reviewing the record sent to him. Dr. Zaldivar is board-certified in internal medicine, pulmonary disease and sleep disorder medicine. He is also a B-reader. Dr. Zaldivar conducted an examination which included the taking of histories, a chest x-ray, pulmonary function testing and blood gas studies. Dr. Zaldivar recorded a smoking history of half a pack of cigarettes per day for two years when the Claimant was in his 50's. Dr. Zaldivar concluded that there was no evidence to justify a diagnosis of coal workers' pneumoconiosis or any dust disease of the lungs. While he did find a pulmonary impairment to be present, he opined that it

was the result of smoking and asthma and not the result of coal mining. From a pulmonary standpoint, the Claimant "may well be capable of performing his usual coal mining because the absolute exhaled volume in one second is so high." Dr. Zaldivar stated that an exercise test would be needed to determine the exact degree of impairment. It was his opinion, however, that from a pulmonary standpoint, the Claimant was capable of performing his usual coal mining work or work requiring similar exertion.

The deposition testimony of Dr. Zaldivar was taken on January 3, 2005. EX 8. At that time, Dr. Zaldivar reiterated his opinion as noted above.

*Dr. Robert J. Crisalli (Examination on behalf of Employer)*

For the Employer, Dr. Robert J. Crisalli examined the Claimant on February 2, 2004 and provided a medical report dated May 19, 2004. EX 4. Dr. Crisalli is board-certified in internal medicine and pulmonary disease. He took occupational, social, family and medical histories, and conducted a physical examination, chest x-ray, blood gas studies and pulmonary function testing. Dr. Crisalli recorded a smoking history of two to six months in 1992. He concluded, based upon his examination, that the Claimant suffered from asthma, chronic bronchitis, mild pulmonary functional impairment based on post-bronchodilator studies and obstructive sleep apnea. He found that the Claimant did not suffer from coal workers' pneumoconiosis. Dr. Crisalli stated that he found only a mild pulmonary functional impairment secondary to mild obstruction due to asthma and concluded that the Claimant was not disabled by this obstruction to airflow. Dr. Crisalli opined that the Claimant "may well retain the pulmonary functional capacity to perform his previous job in the coal mines with adequate anti-asthma therapy," noting, however, that asthma is a disease of variable obstruction and there might be days when the Claimant would be unable to perform his regular coal mine work due to his asthma.

The deposition testimony of Dr. Crisalli was taken on February 28, 2005. EX 9. At that time, Dr. Crisalli reiterated his opinion as noted above.

## DISCUSSION AND APPLICABLE LAW

As the Claimant's prior claim was denied because he had failed to establish total disability due to pneumoconiosis, that element will be considered first. Initially, it must be noted that pneumoconiosis is broadly defined in the regulations. Thus, pneumoconiosis is defined as follows:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 CFR § 718.201 (2004).

20 CFR § 718.202(a) provides that a finding of the existence of pneumoconiosis may be based on evidence from a (1) chest x-ray, (2) biopsy or autopsy, (3) application of the presumptions described in Sections 718.304, 718.305, or 718.306 (none of which are applicable here), or (4) a physician exercising sound medical judgment based on objective medical evidence and supported by a reasoned medical opinion. There is no autopsy or biopsy evidence of record and the presumptions set forth above do not apply in this case. In order to determine whether the evidence establishes the existence of pneumoconiosis, I must consider the chest x-rays and medical opinions – the two categories of evidence applicable in this case.

Pneumoconiosis is a progressive and irreversible disease. *Woodward v. Director, OWCP*, 991 F.2d 314, 320 (6th Cir. 1993). As a general rule, therefore, more weight is given to the most recent evidence. *See Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 151-152 (1987); *Eastern Associated Coal Corp. v. Director, OWCP*, 220 F.3d 250, 258-259 (4th Cir. 2000); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 1167 (6th Cir. 1997); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 602 (3rd Cir. 1989); *Stanford v. Director, OWCP*, 7 B.L.R. 1-541,

1-543 (1984); *Tokarcik v. Consolidated Coal Co.*, 6 B.L.R. 1-666, 1-668 (1983); *Call v. Director, OWCP*, 2 B.L.R. 1-146, 1-148-1-149 (1979). This rule is not to be mechanically applied to require that later evidence be accepted over earlier evidence. *Woodward*, 991 F.2d at 319-320; *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992); *Burns v. Director, OWCP*, 7 B.L.R. 1-597, 1-600 (1984).

Of the three available x-rays in this case, one was read as positive by Dr. Patel and negative by Dr. Wiot, while the two other x-rays were read as negative. For cases with conflicting x-ray evidence, the regulations specifically provide, "Where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 CFR § 718.202(a)(1) (2004); *Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985); *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31, 1-37 (1991).

Readers who are board-certified radiologists and/or B readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n.5 (1985). Greater weight may be accorded to x-ray interpretations of dually qualified physicians. *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128, 1-131 (1984). A judge may consider the number of interpretations on each side of the issue, but not to the exclusion of a qualitative evaluation of the x-rays and their readers. *Woodward*, 991 F.2d at 321; *see Adkins*, 958 F.2d at 52. Finally, a radiologist's academic teaching credentials in the field of radiology may be relevant to the evaluation of the weight to be assigned to that expert's conclusions. *See Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-108 (1993).

In this case, Dr. Wiot, a B-reader and board-certified radiologist, found the July 11, 2002 x-ray to be negative. It was read as positive, however, by Dr. Patel who is also a B-reader and board-certified radiologist. Dr. Zaldivar, a B-reader, read the September 3, 2003 x-ray as negative, and Dr. Willis, a board-certified radiologist, read the February 2, 2004 x-ray as negative. While Dr. Patel is a dually-qualified physician, I find that the preponderance of negative readings, as rendered by Drs. Wiot, Zaldivar and Willis, outweighs the one positive reading of record. Accordingly, I do not find the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a).

## Analysis of Medical Opinions

I must next consider the medical opinions. The Claimant can establish that he suffers from pneumoconiosis by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65, 1-66 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295, 1-296 (1984); *Justus v. Director, OWCP*, 6 B.L.R.

1-1127, 1-1129 (1984). A "reasoned" opinion is one in which the judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields*, above. Whether a medical report is sufficiently documented and reasoned is for the judge to decide as the finder-of-fact; an unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149, 1-155 (1989) (*en banc*). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1291, 1-1294 (1984). A physician's report may be rejected where the basis for the physician's opinion cannot be determined. *Cosaltar v. Mathies Coal Co.*, 6 B.L.R. 1-1182, 1-1184 (1984). An opinion may be given little weight if it is equivocal or vague. *Griffith v. Director, OWCP*, 49 F.3d 184, 186-187 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91, 1-94 (1988); *Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236, 1-239 (1984).

The qualifications of the physicians are relevant in assessing the respective probative values to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597, 1-599 (1984). More weight may be accorded to the conclusions of a treating physician as he or she is more likely to be familiar with the miner's condition than a physician who examines him episodically. *Onderko v. Director, OWCP*, 14 B.L.R. 1-2, 1-6 (1989). However, a judge "is not required to accord greater weight to the opinion of a physician based solely on his status as claimant's treating physician. Rather, this is one factor which may be taken into consideration in … weighing … the medical evidence …" *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-105 (1994). Factors to be considered in weighing evidence from treating physicians include the nature and duration of the relationship, and the frequency and extent of treatment. In appropriate cases, a treating physician's opinion may be given controlling weight, provided that the decision to do so is based on the credibility of the opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 CFR § 718.104(d) (2004).

The Claimant has not established by medical opinion evidence that he has pneumoconiosis. After weighing all of the medical opinions of record, I accord greater probative weight to the opinions of Drs. Zaldivar and Crisalli. Both possess excellent credentials in the field of pulmonary disease. Both had the opportunity to examine the Claimant as well as to review other medical evidence in the record. I find their reasoning and explanation in support of their conclusions more complete and thorough than that provided by Dr. Porterfield, the only physician who concluded that the Claimant suffered from coal workers' pneumoconiosis and was disabled thereby.

Dr. Porterfield made a diagnosis of coal workers' pneumoconiosis, providing as his sole explanation, the chest x-ray reading. However, I have found that x-ray evidence to be negative. Dr. Porterfield's opinion is otherwise devoid of any reasoning or support for his opinion and therefore, I accord it less weight. Furthermore, Dr. Porterfield relies upon a smoking history which is in direct conflict with that testified to by the Claimant at the hearing. For purposes of this matter, I find that the Claimant testified credibly regarding his smoking history at the hearing herein, and find that testimony to be an accurate reflection of his smoking history. It is significantly greater than that relied upon by Dr. Porterfield, or indeed any of the physicians of record.

Therefore, I find that Dr. Porterfield's opinion is not entitled to as much weight as the opinions of Dr. Crisalli and Dr. Zaldivar.

Thus, the Claimant has failed to establish the presence of pneumoconiosis by medical opinion evidence.

## Total Disability

Even assuming, *arguendo*, that the existence of pneumoconiosis had been established, the Claimant would still have to establish total disability due to pneumoconiosis. A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), 20 CFR § 718.304 (2004), or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment. 30 U.S.C. § 902(f), 20 CFR § 718.204(b) and (c) (2004). The Regulations provide five methods to show total disability other than by the presence of complicated pneumoconiosis: (1) pulmonary function studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinion; and (5) lay testimony. 20 CFR § 718.204(b) and (d) (2004). Lay testimony may only be used in establishing total disability in cases involving deceased miners, and in a living miner's claim, a finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony. 20 CFR § 718.204(d) (2004); *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-106 (1994). There is no evidence in the record that the Claimant suffers from complicated pneumoconiosis or cor pulmonale. Thus, I will consider pulmonary function studies, blood gas tests, and medical opinions.

### Pulmonary Function Tests

The pulmonary function study conducted by Dr. Porterfield in 2002 produced qualifying values, while the study conducted by Dr. Zaldivar in 2003 did not. The most recent study, conducted in 2004, produced an FEV1, pre-bronchodilator, of 2.14. This value is a qualifying one according to the applicable values set forth in the tables in Appendix B of Part 718. The post-bronchodilator study, however failed to produce qualifying values. When studying these results and taking into account the progressive nature of the disease, as well as the fact that these studies are effort dependent, I find that the values obtained in 2003 and the post-bronchodilator values obtained in 2004 dictate against a finding of total disability pursuant to 20 C.F.R. § 718.204(b)(2)(i).

### Arterial Blood Gas Studies

None of the ABG studies support a finding of total disability. Therefore, total disability has not been established pursuant to 20 C.F. R. § 718.204(b)(2)(ii).

Medical Opinions

Dr. Porterfield finds total disability; however, he provides insufficient reasoning for this conclusion, and consequently, I find that his opinion is less well-reasoned and well-documented than that of Dr. Zaldivar on this issue.

Dr. Zaldivar finds a pulmonary impairment, but he specifically concludes that the Claimant is capable of performing his usual coal mining work. As discussed supra, I find his opinion to be well-reasoned and well-documented.

Dr. Crisalli finds also pulmonary impairment, but in his opinion, it is not totally disabling. Dr. Crisalli does state, however, that there might be days when the Claimant would not be able to work, as a result of his asthma. On this issue, I find that Dr. Crisalli's opinion is, at best, equivocal and, therefore, insufficient to meet the Claimant's burden of proof.

In sum, both Dr. Crisalli and Zaldivar found no significant respiratory or pulmonary difficulties. Both found no coal workers' pneumoconiosis. Dr. Zaldivar clearly found that the Claimant could return to a job in the coal mines, while Dr. Crisalli's opinion in this respect is equivocal. I find that the opinion of Dr. Zaldivar -- that the Claimant does not have a disabling pulmonary or respiratory disability -- is consistent with the weight of the medical evidence as a whole, including the pulmonary function and arterial blood gas studies. I further find that his opinion is supported, to some degree, by that of Dr. Crisalli. Therefore, total disability has not been established by the medical opinion evidence.

Summary

In the instant case, the weight of the pulmonary function or blood gas studies evidence is not indicative of total disability. Therefore, total disability cannot be established pursuant to 20 CFR § 718.204(b)(i) or (ii) (2004). Furthermore, of the physicians who examined the Claimant, Drs. Crisalli and Zaldivar provided the most convincing evidence to show the Claimant is not totally disabled due to a pulmonary or respiratory impairment. When these medical opinions are considered in conjunction with the results of the objective tests, I conclude that the Claimant has failed to establish that he is totally disabled by a pulmonary or respiratory impairment. Given that the burden of proof is on the Claimant to affirmatively establish entitlement to benefits, the opinions of Drs. Crisalli and Zaldivar are clearly insufficient to establish same, while the opinion of Dr. Porterfield, for the reasons discussed above, is neither well-reasoned nor well-documented and thus, insufficient to meet Claimant's burden of proof herein.

## Causation of Total Disability

In order to be entitled to benefits, the Claimant must establish that pneumoconiosis is a "substantially contributing cause" to the miner's disability. A "substantially contributing cause" is one which has a material adverse effect on the

miner's respiratory or pulmonary condition, or one which materially worsens another respiratory or pulmonary impairment unrelated to coal mine employment. 20 CFR § 718.204(c) (2004); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990); *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 734 (3rd Cir. 1989). As I have found that the evidence does not establish that the Claimant has pneumoconiosis or that he is totally disabled, he cannot establish that pneumoconiosis is a substantial contributor to his disability.

## FINDINGS AND CONCLUSIONS REGARDING ENTITLEMENT TO BENEFITS

Because the Claimant has failed to meet his burden to establish that he has pneumoconiosis and that he is totally disabled, he is not entitled to benefits under the Act. The Claimant has also not established a material change in condition since he has failed to establish the existence of total disability due to pneumoconiosis.

## ATTORNEY FEES

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to benefits. *See* Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928, as incorporated into the Black Lung Benefits Act, 30 U.S.C. § 932. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim.

## ORDER

The claim for benefits filed by the Claimant on June 3, 2002, is hereby DENIED.

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WILLIAM S. COLWELL
Administrative Law Judge

Washington, D.C.

**NOTICE OF APPEAL RIGHTS:** If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your

appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).